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Office Supreme Court U. S.
FILED
MAY 15 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ
Defendant in Error.

No. 1.

In error to the District Court of the United States for the District of Porto Rico.

MOTION BY PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
ATTORNEYS FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ *Plaintiff in Error,* *vs.* **JOSÉ PEREZ Y FERNANDEZ** *Defendant in Error.*	**No. 1.**

In error to the District Court of the United States for the District of Porto Rico.

MOTION BY PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

Now comes the above named José Antonio Fernandez y Perez, plaintiff in error herein, by James S. Harlan and John Maynard Harlan, his attorneys, and suggests to the court that in connection with his petition to the lower court for the allowance of a writ of error herein this plaintiff in error presented a bond in the form required by law in such cases and requested that the writ of error might be made a supersedeas (Rec., 77, 78, 80, 82); that although a bond satisfactory

to the court was finally presented by this plaintiff in error and approved by the court, nevertheless the said court, for reasons not clearly understood by this plaintiff in error, declined to enter an order for a supersedeas (Rec., 93, 98); that in consequence an execution issued on the judgment herein (Rec., 90), which execution was subsequently levied on the property of this plaintiff in error and by means thereof the amount of the said judgment herein was collected.

The plaintiff in error therefore moves the court for an order to accompany its order of reversal herein, directing the lower court to cause an investigation to be made of the aforesaid facts and in case it shall appear that an execution has been issued and levied and the said judgment paid as aforesaid, that an order of restitution shall be issued by the lower court in accordance with the law and the practice in such cases.

Respectfuly submitted.

JOSE ANTONIO FERNANDEZ Y PEREZ.

A copy of this motion has been mailed to counsel for defendant in error at Washington, and notice given to him that the motion would be presented to the court on Monday, May 14, 1906.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

STATEMENT IN SUPPORT OF FOREGOING MOTION.

The record in this case shows that the plaintiff in error tendered a supersedeas bond to the lower court and filed a petition for a writ of error and supersedeas. There is some confusion in the record as to why the bond so tendered was not satisfactory. Apparently there was some objection to the surety on the bond. A new bond was then tendered and approved by the court. But the court held (Rec., 89) that it could not operate as a supersedeas. The defendant in error immediately made a motion that execution issue (Rec., 83), and execution was then issued (Rec., 90).

We are advised that the execution was subsequently levied upon the property of the plaintiff in error and the full amount of the judgment collected. This motion for an order to the lower court to issue a writ of restitution is made because, although that course is well established and has the authority of this court, there is not often occasion to resort to it, and it is thought that some direction by this court to the lower court may be useful.

Northwestern Fuel Co. v. *Broch*, 139 U. S., 216.

And see order of reversal in

Morris v. *U. S.*, 7 Wal., 578; *Morris Cotton*, 8 Wal., 507; *Ex parte Morris*, 9 Wal., 605.

The point in this suggestion is that the Federal Court in Porto Rico is a new court and unless some direction is issued to it by this court in this connec-

tion it is not improbable that the plaintiff in error will be put to the expense and suffer the delay incident to a new action to recover against the defendant in error.

Respectfully submitted,

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

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In error to the District Court of the United States for the District of Porto Rico.

FURTHER SUGGESTIONS IN SUPPORT OF THE MOTION OF PLAINTIFF IN ERROR FOR AN ORDER TO THE LOWER COURT TO ISSUE A WRIT OF RESTITUTION HEREIN.

Since the above mentioned motion was made herein, information has reached us showing that the execution in this case, which on the face of the record (Rec., 90) was made returnable sixty days after its date, was actually levied on the property of the plaintiff in error and the entire amount of the judgment and costs collected.

We are also advised that the defendant in error has

abandoned Porto Rico and has returned to live in Spain; that before leaving the island he transferred much, if not all, of his real estate to a friend and former agent. The plaintiff in error has reason to believe that this was not a *bona fide* conveyance but was colorable only and made by defendant in error in hope of evading his obligations to the plaintiff in error upon the reversal of the judgment herein. At any rate it is manifest that it will be impossible for the plaintiff in error to get service on the defendant in error in any *new* action brought against him to recover the amount due to the plaintiff in error under the order of reversal. All this suggests the propriety of the motion made and the need of some direction to the lower court in order that recovery may be had without delay or additional expense and *as a part of this proceeding*. In support of these suggestions an affidavit is hereto attached.

A copy of these suggestions has been mailed to counsel for defendant in error at Washington.

Respectfully submitted

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for plaintiff in error.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

James S. Harlan, being first duly sworn on oath, deposes and says that on Tuesday morning, May 15, 1906, he received from F. L. Cornwell, an attorney at law in active practice in Porto Rico and the attorney of the plaintiff in error herein in the lower court, a communication advising this affiant that José Perez y Fernandez, the defendant in error herein, had returned to Spain, apparently for the purpose of abandoning Porto Rico as a place of residence; that a short time before doing so he made a pretended conveyance of his real estate in that island to a friend and former agent; that said Cornwell and the plaintiff in error believe that this conveyance was colorable only and that it was made by the defendant in error in the effort and for the purpose of evading his obligations to the plaintiff in error upon the reversal of the judgment herein.

Further affiant saith not.

JAMES S. HARLAN,

Subscribed and sworn to before me this 16th day of May, A. D. 1906.

NINA M. BARNUM,
Notary Public.